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No. 10-1086

Supreme Court, U.S.
FILED
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IN THE

United States Supreme Court

LIBERTY APPAREL COMPANY INC. and ALBERT NIGRI,

Petitioners-Appellees,

v.

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, and XUE JIN LIN,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Second Circuit

REPLY PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioners Liberty Apparel Company, Inc. and Albert Nigri ("Petitioners") submit this reply brief in support of their Petition for a Writ of Certiorari (the "Petition") to correct various errors and distortions contained in Respondents' Brief in Opposition to the Petition (the "Opposition Brief"[1]). The Opposition Brief distorts Petitioners' grounds for appeal, the relevant caselaw and the facts of the case.[2] Once these distortions are revealed, it is clear that, for the reasons stated in the Petition, this Court should grant the Petition.

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[1]Citations to specific portions of the Opposition Brief shall be designated as "Op."

[2]As per Rule 10 of the this Court's rules, Petitioner will not address these distortions of the record because they seek a writ of *certiorari* based on circuit splits regarding important federal issues concerning: (a) the standard for joint employment under the FLSA; and, (b) whether the ultimate issue of joint employment is an issue of law which should be determined by a judge and subject to *de novo* review.

POINT I

THE RELEVANT FACTORS FOR JOINT EMPLOYMENT HAVE NOT BEEN DECIDED BY THIS COURT AND ARE A MATTER OF WIDESPREAD DEBATE BY THE CIRCUIT COURTS

A. *Rutherford* Did Not Address Joint Employment Under The FLSA

Respondents' Opposition Brief claims that this Court's decision in *Rutherford v. McComb*, 331 U.S. 722 (1947) has already decided the factors to be considered in determining joint employment under the FLSA. This argument is fallacious. *Rutherford* does not address joint employment but, rather, the standard for determining whether a worker is an employee or an independent contractor.

Throughout, *Rutherford* clearly was addressing the question of whether the workers were employees or independent contractors. In describing the proceedings in the District Court, *Rutherford* stated,

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[3]In their argument, Respondents cite cases noting, generally, the FLSA's definition of employment is significantly broader than the common law definition. That caselaw, however, is irrelevant to the determination of this case because, as *Rutherford* noted, "there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford*, at 728.

"[t]he Administrator thought these facts brought the boners within the classification of *employees*, as that term is used in the Act. But the District Court thought that they were *independent contractors*..." *Id.*, at 727 (emphasis added). In defining the breadth[3] of the definition of employee in the FLSA, this Court held, "[w]here the work done, in its essence, follows the usual path of an *employee*, putting on an '*independent contractor*' label does not take the worker from the protection of the Act." *Id.*, at 729 (emphasis added). Finally, in reaching its conclusion, *Rutherford* was crystal clear as to the issue before it, holding,

> "[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical *independent contractor*. Upon the whole, we must conclude that these meat boners were *employees* of the slaughtering plant under the Fair Labor Standards Act."

Id, at 730 (emphasis added).

Courts consistently have held that different factors are relevant to determining joint employment versus choosing between employment and an independent contractor relationship. *See, e.g., Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006); *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998). *Even Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) *("Zheng II")*,

whose treatment of *Rutherford* forms the basis of Respondents' arguments, clearly delineates the distinction between these different legal questions. *Zheng II*, at 67-68, n.8.

Plainly, *Rutherford* addressed a different legal question than that raised in the Petition. Consequently, Respondents' argument that the Supreme Court already decided the issue is unavailing to deny granting a writ of *certiorari*. At best, Respondents have prematurely supported their case for affirming the Second Circuit's decision.

B. The Circuit Courts are Split on the Legal Standard To Be Applied in Determining Joint Employment and, Therefore, As To The Correct Decision in This Case

Contrary to Respondents' contention, there is a lively split between the circuits as to the proper standard for determining joint employment under the FLSA; and, consequently, whether Petitioners should be considered Respondents' joint employers. Respondents did not attempt to address the significant cases of various courts – spanning the full period from the decision in *Zheng II* to the present – which held that "[t]here is a split among the circuits as to the precise factors to consider in determining joint employment under the FLSA." *Dinkins v. Varsity Contractors*, 2005 U.S. Dist. LEXIS 6732, 23 (N.D. Ill. 2005); *See also Lepkowski v. Telatron Marketing Group*, 2011 U.S. Dist. LEXIS 9388 (W.D. Pa. 2011); *Morgan v. Speak Easy, LLC*, 625 F.Supp.2d 632, 649 (N.D. Ill. 2007);

Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 2006 U.S. Dist. LEXIS 93896 (N.D. Ill. 2006); *Zavala v. Wal-Mart Stores Inc.*, 393 F. Supp. 2d 295 (D. N.J. 2005).

Respondents' answer to these cases is a deafening silence. They do not cite, analyze, controvert or distinguish them. Instead, Respondents resort to misdirection and attempt to divert this Court from a circuit split which continues to exert a substantial impact on businesses and workers nationwide.

One such diversion is Respondents' contention that no circuit split exists as to the general standard to be applied because all the circuits' tests are based on the economic realities test and allow for consideration of extraordinary case-specific factors. As the various above-cited cases have held, there is a strong debate about the general factors to be considered in interpreting joint employment, and it is clear that this debate would affect the outcome of this case. This can be seen by the differing analysis in *Zheng v. Liberty Apparel*, 2002 U.S. Dist. LEXIS 4226 (S.D.N.Y. 2002) ("*Zheng I*") (using the four factor test from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)) and *Zheng v. Liberty Apparel*, 556 F. Supp. 2d 284 (S.D.N.Y. 2008) (using the six factor test from *Zheng II*).

Respondents claim that courts using the *Bonnette* test are consistent with the Second Circuit's six-factor test. This too is incorrect. Courts using the four-factor test have held that where only one or none of the four factors are present, joint employment

is not found as a matter of law. E.g. *Chao v. Diversified Transfer & Storage, Inc.*, 2008 U.S. Dist. LEXIS 5634 (D. Mont. 2008). (finding not joint employment because "none of the four factors identified by the Ninth Circuit as relevant to the issue of joint employment are present in this case."); *Muhammad v. Platt College*, 1995 U.S. App. LEXIS 1163 (8th Cir. 1995). Similarly, in *Zheng I*, the court found that none of the *Bonnette* factors favored Respondents and, therefore, Petitioners were not Respondents' joint employers. *Zheng I*, at 20-21.

In contrast, under the Second Circuit's current analysis, when none of the four factors are present, it does not lead to a ruling against joint employment, but merely means the court must shift to the six-factor test. *Zheng II, at 72; See also Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008). At both the trial and appellate level, Petitioners repeatedly requested the *Bonnette* factors be considered part of the test for joint employment to no avail.

Additionally, the tests used by the Fourth, Fifth and Eleventh circuits, discussed at length in the Petition and ignored by Respondents, conflict with the Second Circuit's opinion. For example, the Fourth Circuit would have explicitly considered the *Bonnette* factors, and, as understood by its district courts, would have granted summary judgment to Petitioners because the four factor test is unambiguously in their favor. *Jacobson v. Comcast*, 2010 U.S. Dist. LEXIS 102834, fn.4 (D. Md. 2010) (holding

that the Fourth Circuit test looks at *Zheng II's* factors when the result is not determined by the *Bonnette* factors). The Fifth and Eleventh Circuits tests likewise significantly conflict with the Second Circuit's test, as explained in the Petition. Petitioners also note that Respondents failed to address Petitioners' demonstration that the Second Circuit test is designed in a manner that will find any standard garment manufacturer to be a joint employer with his contractors' employees, whereas the other circuits use tests that will differ in result based on the individual facts in the case. Respondents instead "double-down" on their view that all garment manufacturers should be considered joint employers. (Op. p. 2-5.)[4] Petitioners and Respondents argued at the trial and appellate level over this issue, which is a critical component of the circuit split.

A second diversion Respondents use is to argue that no FLSA joint employment case involving the garment industry has occurred since *Zheng II* and, therefore, there is no circuit split. (Op. p. 10) This is irrelevant because the circuit split regarding the proper legal standard for joint employment under

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[4]In arguing against a circuit split, Respondents repeatedly cite cases applying the Migrant and Agricultural Workers Protection Act, 29 U.S.C. §§ 1801 et seq. ("AWPA"). Many courts have held a different standard applies to these cases due to extensive administrative regulations mandating factors to be considered in determining employment under that law. *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997)

the FLSA exists in a myriad range of circumstances and economic relationships. Respondents cite no support for their strangely cramped definition of a circuit split, and this court frequently discusses circuit splits over legal standards in which the cases do not have identical facts. *Kasten v. Saint-Gobain Performance Plastics Corporation*, 563 U.S. ___ (2011) (deciding a circuit split where the conflicting FLSA cases involved a satellite television company, the Seattle Supersonics basketball team, a hospital and a chicken farm.) This Court has considered circuit splits regarding the definition of employment involving multiple industries. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (resolving a circuit split regarding the definition of employment in cases involving a magazine, software company, a company that sold statuettes and figurines and an advertising agency).

Respondents' argument is particularly peculiar as they do not discuss or even cite *Zhao v. Bebe Stores*, 247 F. Supp. 2d 1154 (C.D. Ca. 2003), which, as discussed in the Petition, held, in a factually identical situation, that a garment manufacturer was not the joint employer of his contractor's employees.

Similarly, Respondents' attempt to depict *Zheng II's* test as a specific test directed at the garment industry, and not a general test for joint employment, is clearly erroneous. (Op. p. 11, 16) The Second Circuit has used this test for determining joint employment of a nurse in a hospital and lower courts have applied it to other circumstances,

including workers at the U.S. Open tennis tournament. *Barfield*, supra; *Bogosian v. All Am. Concessions*, 2008 U.S. Dist. LEXIS 78625 (E.D.N.Y. 2008).

Additionally, the Opposition Brief does not address Petitioners' arguments that the Petition should be granted because it concerns an important federal issue which needs to be decided by this Court. Rather, Respondents help demonstrate its important effect on American workers by arguing that it would be more legitimate for American manufacturers to outsource to an underdeveloped country than to outsource within the American city that they are located. (Op. p. 3) Such a rule can only lead to the loss of American jobs, with devastating consequences for American workers at a time when they are already losing manufacturing jobs to foreign countries and are plagued by high unemployment.

Similarly, Respondents' use of AWPA cases demonstrates the importance of this case. Courts have accepted that Congress was trying to establish joint employment in nearly all AWPA cases. *Torres-Lopez, supra*, at 641. Applying such a definition to all FLSA cases would have a devastating effect on an American economy which relies heavily on outsourcing. *Zheng II*, at 73.

C. Respondents' Arguments Against *Certiorari* Rely on a Distortion of The Precise Question For Which Petitioners Seek *Certiorari*

Respondents' Opposition Brief argues the Petition should be denied because Petitioners did not argue at trial that only the *Bonnette* factors should be considered in determining joint employment. (Op. pp. 17-20) Similarly, while arguing that *Rutherford* controls this case, Respondents argued that the issue raised by the Petition is whether only the four *Bonnette* factors are relevant to joint employment. Respondents' argument blatantly mischaracterizes the issue raised by the Petition's first question, *to wit*, whether, under the facts present in this case, where all four *Bonnette* factors and three of the *Zheng II* factors weigh in Petitioners' favor, Petitioners are not Respondents' employer as a matter of law. As explained in the Petition, which of the various standards a Court should use to determine this question will weigh on the question, but Petitioners have never argued that only the four *Bonnette* factors can be relevant.

For example, Petitioners repeatedly have argued that the first *Zheng II* factor, whether they owned Respondents' place of employment or provided them with equipment, is an important factor weighing in their favor. Petitioners have argued both at trial and on appeal that, as explained in the Petition, specific *Zheng II* factors should either be interpreted in a manner consistent with other circuits or given less weight. Respondents neither objected to Petitioners' right to raise these arguments at the appellate level nor addressed them in their Opposition Brief.

Moreover, while Respondents are correct that

Petitioners submitted questions that included the six factors set out by *Zheng II*, they fail to note that Petitioners also submitted the four *Bonnette* factors and several other case specific factors. Petitioners raised these same issues in their appellate brief, and in the Petition. Thus, Respondents' arguments against the Petition's first question are dependent on distorting the question raised.

POINT II

RESPONDENTS' ARGUMENTS AGAINST THE PETITION'S SECOND QUESTION FAIL TO REBUT THE CIRCUIT SPLIT OF WHETHER THE ULTIMATE ISSUE OF JOINT EMPLOYMENT IS A LEGAL ISSUE TO BE DECIDED BY THE DISTRICT COURT AND SUBJECT TO *DE NOVO* REVIEW

As with their arguments refuted above, Respondents' main argument against the second question doesn't appear to be an argument against the existence of a circuit split, but, rather, an argument for affirming the Second Circuit's decision. They submit that this Court, in non-FLSA cases, has held the issue of employment is largely a factual issue and the Second Circuit's determination is supported by this precedent. This argument, while appropriate for a merits stage brief, does not address the standard for granting a writ of *certiorari* contained in Rule 10(a) of this Court's rules, which considers whether there is a circuit split, not which of the

conflicting circuits is correct.

Moreover, Respondents' argument makes the erroneous assumption that all statutes' definitions of employment should be considered in the same manner. This argument is foreclosed by this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992) which differentiated between statutes which do not define employment and are therefore governed by a common-law agency test, and the FLSA, which must be interpreted based on its statutory definitions. Statutory interpretation is an issue of law and should be determined by a judge and subject to *de novo* review. E.g. *United States v. Haas*, 623 F.3d 1214, 1218 (8th Cir. 2010) ("Our review requires statutory interpretation, an issue of law that we consider *de novo*").

Respondents' arguments that the Fifth and Tenth Circuits' cases cited in the Petition do not conflict with the Second Circuit's decision in *Zheng v. Liberty Apparel*, 617 F.3d 182 (2nd Cir. 2010) ("*Zheng IV*") are based on misreading the former cases. Respondents attempt to distinguish *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), by arguing that the Fifth Circuit reversed the lower court because the decision was clearly erroneous. While arguably a defensible reading of Judge Higginbotham's concurrence, it is not the view of the Fifth Circuit panel's opinion which declared "[t]his Court has repeatedly held that the ultimate conclusion that an individual is an 'employee' within the meaning of the FLSA is a legal determination

rather than a factual one." *Castillo*, at 185. *Castillo* then cited the Fifth Circuit's previous decision in *Donovan v. Tehco* (642 F.2d 141, 143 n 4 (5th Cir.1981), which held that "[i]n reviewing the district court's ultimate findings that the workers at issue were independent contractors, we are not constrained by the 'clearly erroneous' standard. Rather, these ultimate findings are treated as legal determinations." *Castillo*, at 186. *Castillo* then held, contrary to Respondents' arguments and the Second Circuit's view, that

> Although the above-mentioned cases were tried to the Court rather than to a jury, there is no basis to differentiate between a jury and a nonjury case regarding the status of an employee determination as legal or factual. The substantive provisions of the Act at issue -- violations of minimum wage, overtime, and record keeping provisions -- are the same in both jury and nonjury cases. If the employee/independent contractor determination is a legal one in a case tried to the court, it must also be a legal one in a case tried to a jury... A plaintiff's decision to exercise his right to a jury trial does not change the standard of review to be applied by this Court.

Castillo, at 186-87.

Similarly, Respondents' reading of *Johnson v. Unified Gov't of Wyandotte County/Kansas City*, 371 F.3d 723 (10th Cir. 2004) is precisely the opposite

of *Johnson's* holding. Respondents claim *Johnson* held that determination of employment under the FLSA should be reviewed for sufficiency of the evidence. *Johnson* actually held that a determination of employment was an issue of law ordinarily determined by the district court judge and reviewed *de novo* and only declined to overturn the district court's decision due to the doctrine of invited error. *Johnson*, at 729.

In citing *Bristol v. Bd. of County Commissioners*, 312 F.3d 1213 (10th Cir. 2002), Respondents again ignored *Darden's* holding discussed above, as *Bristol* involves interpretation of the ADA, not the FLSA.

CONCLUSION

For reasons cited in this brief and in the Petition, this Court should grant Petitioners' Petition for a writ of *certiorari*.

Respectfully Submitted,

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